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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1253

JOSEPH FERRARA,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

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Petitioner, Joseph Ferrara, prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois.

JUDGMENT AND OPINIONS OF THE COURTS BELOW.

The judgment of the Circuit Court of Du Page County, Eighteenth Judicial Circuit, was entered on February 16, 1968, and is not reported.

The original opinion of the Appellate Court of Illinois was filed on August 22, 1969, and is set forth in Appendix A.

A petition for leave to appeal to the Supreme Court of Illinois was timely filed and said petition was denied on November 24, 1969.

The opinion of the Appellate Court of Illinois is reported in 111 Ill. App. 2nd 472, 250 N.E. 2d 530. The Supreme Court of Illinois did not file an opinion denying defendant's petition for leave to appeal.

JURISDICTION.

The opinion of the Appellate Court of Illinois was filed on August 22, 1969.

A petition for leave to appeal to the Supreme Court of Illinois was denied on November 24, 1969 and is set forth in Appendix B.

This petition for writ of certiorari is filed within ninety (90) days after the date on which the Illinois Supreme Court denied leave to appeal.

The jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1257 (3).

QUESTIONS PRESENTED.

1.

Whether the use of a 25 year old armed robbery conviction in an indictment to enhance the penalty for shoplifting, without limiting instructions to the jury or any safeguards whatever regarding the prior felony conviction, is so grossly unfair and prejudicial as to deprive the petitioner of due process of law and a fair trial?

2.

Whether the presentation of a 25 year old armed robbery conviction to a jury in the State's case in chief for purposes of an enhanced penalty, accompanied by an instruction inferring that the jury may consider the prior conviction in determining the defendant's guilt or innocence concerning the current charge, is so grossly unfair, prejudicial and erroneous as to deprive the petitioner of due process of law and a fair trial?

3.

Whether the use of a 25 year old armed robbery conviction, after a legally blameless life, for purposes of impeaching the credibility of the petitioner in a close factual case, is so remote and devoid of probative value as to constitute a deprivation of due process of law and a denial of a fair trial?

STATEMENT OF THE CASE.

In 1967, the petitioner was charged with the following two-count indictment:

Count I

The grand jurors chosen, selected and sworn, in and for the County of Du Page, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about the 29th day of November, 1966, at and within Du Page County, Illinois, Joseph Ferrara, committed the offense of theft in that he did then and there knowingly exert unauthorized control over men's wearing apparel having a value of less than $150, owned by E. J. Korvette, division of Spartans Industries, Inc., a corporation, with intent to deprive said owner permanently of the use and benefit of said property, in violation of Illinois Revised Statutes 1965, Chapter 38, Section 16-1(a)(1), and against the peace and dignity of the same People of the State of Illinois.

Count II

The grand jurors chosen, selected and sworn, in and for the County of Du Page, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about the 29th day of November, 1966, at and within Du Page County, Illinois, Joseph Ferrara committed the offense of theft in that he did then and there knowingly exert unauthorized control over men's wearing apparel having a value of less than $150, owned by E. J. Korvette, Division of Spartans Industries, Inc., a corporation, with the intent to deprive said owner permanently of the use and benefit of said property after said defendant had prior there-

to been convicted of the offense of robbery on the 22nd day of June, 1943 in the Criminal Court of Cook County and State of Illinois, in violation of Illinois Revised Statutes 1965, Chapter 38, Section 16-1(a)(1) and against the peace and dignity of the same People of the State of Illinois.

The defendant filed certain motions to quash the indictment and alleged among other things that the twenty-five year old armed robbery conviction was too remote, had no probative value and was so prejudicial to the defendant's defense of the current charge of petty theft as to deprive him of due process of law and a fair trial. The trial court denied the petitioner's motions and a jury trial was commenced.

The facts in the case were in direct conflict. The evidence showed that on November 29, 1966, a cold and rainy day, the petitioner and his wife went to the Korvette Department Store to do some Christmas shopping. The petitioner's wife left to shop and the petitioner browsed in the men's department. Two security detectives for Korvette Department Store testified that they saw the petitioner take a suede leather jacket from a rack, put it on and walk out without paying for it. The petitioner and his wife testified that the petitioner was wearing the jacket when he entered the store and that he had bought and owned the jacket about one month prior to this time. The security men testified that the petitioner wore the jacket approximately five minutes from the time they saw him until they stopped him. The petitioner demonstrated to the jury that there were signs of wear on the jacket that could not possibly have been made in five minutes of wear. The defense also implied that the security men were probably mistaken in this case and pre-

sented evidence that certain release of liability forms were attached to the security reports of this incident.

The state presented evidence to the jury of petitioner's twenty-five year old armed robbery conviction over the objection of the petitioner. The petitioner offered a limiting instruction pertaining to the prior conviction which the court refused to give. The state neither tendered nor offered any limiting instructions regarding the prior felony conviction. The petitioner objected to certain instructions tendered by the state which implied that the jury could consider the prior conviction in their determination of the defendant's guilt or innocence concerning the current charge. The court overruled the petitioner's objection, gave the instructions tendered by the state and the petitioner was convicted.

REASONS FOR GRANTING THE WRIT.

GRAVE CONSTITUTIONAL AND PREJUDICIAL ERRORS EXIST WHEN A TRIAL COURT ALLOWS A JURY TO CONSIDER EVIDENCE OF A PRIOR FELONY CONVICTION WHICH IS UNRELATED TO THE PRESENT CHARGE ON TRIAL AND REFUSES TO GIVE LIMITING INSTRUCTIONS TO THE JURY CONCERNING THAT PRIOR UNRELATED CONVICTION.

GRAVE CONSTITUTIONAL AND PREJUDICIAL ERRORS EXIST WHEN A TRIAL COURT ALLOWS A JURY TO CONSIDER EVIDENCE OF A TWENTY-FIVE YEAR OLD FELONY CONVICTION, UNRELATED TO THE PRESENT CHARGE ON TRIAL, AND ACCOMPANIES THIS EVIDENCE WITH INSTRUCTIONS INFERRING THAT THE JURY MAY CONSIDER THE PRIOR CONVICTION IN DETERMINING THE DEFENDANT'S GUILT OR INNOCENCE CONCERNING THE PRIMARY CHARGE.

The issues presented to this court as a basis for granting the petitioner's writ of certiorari have been taken directly from a recent decision of this court in the three unrelated Texas State Court cases of *Spencer, Bell and Reed* v. *Texas,* 385 U.S. 554, 17 L. ed. 2d 606, 87 S. Ct., 648. In those cases, the defendants were convicted of various primary charges and were given increased punishments on the basis of provisions of the state's habitual criminal statutes. Through allegations in the indictment and through the introduction of evidence respecting the defendants' prior convictions, the jurors in each trial were fully informed of such convictions, but the jurors were instructed that such matters were not to be considered in passing upon the petitioner's guilt or innocence on the primary charges.

The Texas enhanced penalty statute was similar in nature to the present Illinois enhanced penalty statute. (Illinois Revised Statutes, Chapter 38, Section 16-1):

> A person first convicted of theft of property not from the person and not exceeding One Hundred Fifty ($150.00) Dollars in value shall be fined not to exceed Five Hundred ($500.00) Dollars or imprisoned in a penal institution other than the penitentiary not to exceed one (1) year, or both. A person convicted of such theft a second or subsequent time, or after a prior conviction of any type of theft, shall be imprisoned in the penitentiary from one to five years.

The only difference petitioner can discern is that the Texas Code of Criminal Procedure provided that the state read the indictment to the jury and then present evidence relating thereto, (Texas Code of Criminal Procedure, Article 642) whereas, the Illinois Criminal Code is silent as to procedure.

In *Spencer* v. *Texas,* Mr. Justice Harlan, speaking for the majority of the court, first observed that the better procedure would have been a two-stage jury trial or some other alternative where the jury could determine first the defendant's legal culpability on the primary charge. If the defendant were found not guilty of the primary charge, the question of enhanced penalty would be moot. On the other hand, if the defendant were found guilty of the primary charge, a jury could then consider whether an enhanced penalty was to be applied. The important factor, of course, would be to insure that the defendant received a fair trial on the primary charge.

To this end, Mr. Justice Stewart, in a concurring opinion, was constrained to emphasize that the policy of a one-stage trial regarding recidivist procedures was

undesirable and that the two-stage trial was far superior to the procedure complained of. In fact, he noted that Texas had changed their former procedure to provide for a two-stage trial consistent with this court's recommendation.

It is implicit in the holding of the majority in *Spencer* v. *Texas* that the introduction of prior felony convictions in a jury trial could not help but have a prejudicial effect on the trial of the primary charge. Justices Brennan and Douglas go even farther and contend that this procedure undermines the very integrity of the fact finding process and should be reversed. However, Justice Harlan, along with the majority, noted that although the jury might be prejudiced by the prior felony convictions of the defendant, the fact that the trial court gave limiting instructions to the jury, helped protect the defendant's interest.

It is precisely in this area that your petitioner claims he was denied due process and a fair trial. In petitioner's trial, not only did the trial court neglect and refuse to give a limiting instruction regarding the prior felony conviction but the trial court gave state instructions, over objection of the petitioner, which implied that the jury could consider the prior conviction in deciding petitioner's guilt or innocence of the primary charge.

The following are instructions which the trial court gave over objection of the petitioner (Abstract pages 12 and 13).

State's Instruction No. 10 given over objection of defendant:

> The court instructs the jury, in the language of the statute that no person shall be disqualified as a

witness in any criminal case by reason of his having been convicted of any crime; but such conviction may be shown for the purpose of affecting his credibility.

State's Instruction No. 12 given over objection of defendant:

> The Court instructs the jury that a person commits theft as charged in Count II of the indictment when he after having been convicted of any type of theft, knowingly exerts unauthorized control over the property of the owner and intends to deprive the owner permanently of the use or benefit of the property.

State's Instruction No. 17 given over objection of defendant:

> The court instructs the jury that the rule requiring the jury to be satisfied of the guilt of the defendant from the evidence beyond a reasonable doubt in order to warrant the conviction is complied with if, taking the testimony altogether, the jury are satisfied beyond a reasonable doubt that the defendant is guilty. The reasonable doubt that the jury is permitted to entertain to authorize an acquittal must be as to the guilt of the accused on the whole evidence and not as to any particular fact in the case not essential and material to constitute the offense charged.

In overruling the petitioner's objection to State's Instruction No. 12, the court gave the jury an instruction which implied that if they found the petitioner had been convicted of any type of prior theft, he was then guilty of theft as charged in Count II of the indictment.

Aside from the fact that State's Instruction No. 17 is an improper instruction on the law of reasonable doubt, the negative emphasis that the jury is authorized to acquit only if there is a reasonable doubt as to all the

evidence, not part of the evidence, emphasizes the prior conviction. If the jury felt that the part of the evidence having to do with petitioner's prior conviction was proved but they did not believe the primary charge was proved, they still were not authorized to acquit.

State's Instruction No. 10 is also grossly unfair and prejudicial and placed too great an emphasis on petitioner's prior conviction in relation to the primary charge. Chief Justice Burger, in two Circuit Court of Appeals opinions condemned this course of action and elaborated on the decision of *Luck* v. *United States,* 348 Fed. 2d 763. In *Gordon* v. *United States,* 383 Fed. 2d 936 and *Evans* v. *United States,* 397 Fed. 2d 675, the trial court allowed the government to use evidence of past criminal convictions to impeach the defendant. The rule of thumb set out by Chief Justice Burger was that convictions which do not rest on dishonest conduct or have a direct bearing on honesty and veracity, should not be allowed for they tend to show the defendant as a "bad" person rather than demonstrate background facts bearing on credibility. Justice Burger further noted that:

> The nearness or remoteness of the prior conviction is also a factor of no small importance. Even one involving fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally be excluded on the grounds of remoteness. Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that "if he did it before he probably did so this time".

In the instant cause, petitioner's 25 year old armed robbery conviction could not possibly have any probative

bearing on the cause but could only serve to show that the defendant was a "bad" person. The use of the conviction was objected to by defense counsel innumerable times throughout the trial principally because this case was primarily one of credibility. Factually, the case resolved itself into one question; who should be believed? The two security men said petitioner took a coat from Korvette's store. The petitioner and his wife testified that the coat belonged to the petitioner. There was no other corroborating factual evidence in the trial. In a close case such as this, the rationale of the Second Circuit Court of Appeals in *United States* v. *Palumbo,* 401 Fed. 2d 270 is most appropriate. There the court reasoned that before evidence of a prior conviction should be allowed, the court should examine "the nature of the conviction, its bearing on veracity, its age and its propensity to influence the minds of the jurors improperly". If there is a substantial chance of unfair prejudice, it should be rejected. Similarly, in *United States* v. *Hilbuch,* 387 Fed. 2d 328, the Fourth Circuit Court of Appeals felt that the prejudicial effects of prior convictions outweigh the probative force if the prior conviction is, "remote in time, too near the substance of the alleged crime for which the defendant is currently being tried, or involves no element of mendacity or deceitfulness".

Justice Walter V. Schaefer of our Illinois Supreme Court has suggested that the due process clause imposes a much broader restriction:

> When the accused takes the stand in his own behalf he should be subject to impeachment only by proof of past crimes which directly bear on testimonial deception, such as perjury. Past convictions not in this category should not be admissible unless they are relevant for some purpose other than impeachment. The

> contrary practice lies close to the borders of due process, and should be eliminated. Schaefer, *The Suspect and Society*, p. 68, NWU Press 1967.

The Appellate Court of Illinois, in the very last paragraph of its opinion, clearly removes any doubt whatsoever as to the nature of this case:

> A direct conflict exists between the testimony of the prosecuting witnesses and the testimony of the defendant concerning the incident. This conflict was clearly a matter of weight and credibility to be determined by the jury and which the jury resolved in favor of the State.

Thus, the reviewing court admits that this case resolves itself into one question—*credibility*. The refusal of the trial court to prohibit use of this prior conviction without limiting instructions allowed the jury to prejudge petitioner in the light of "bad name and bad general record" and deny him a fair opportunity to defend against a particular charge.

Lastly, there was no limiting instruction given to the jury on behalf of the petitioner. The only instruction that petitioner tendered to the court on the question of limiting the prejudicial effect of the prior conviction was rejected by the trial court. Defendant's Instruction No. 6:

> The court instructs the jury that in determining the guilt or innocence of Joseph Ferrara, you should not feel a prejudice against him by reason of the nature of the offense charged in the Complaint.

Petitioner further contends that when the State sought to use a prior felony conviction for enhanced penalty, the State had the obligation and the duty to present certain limiting instructions regarding the use and the weight to be given to the prior felony conviction. In the instant case, the State not only failed to offer any limiting instructions but objected to petitioner's limiting instruction.

CONCLUSION.

Although it is not the function of this Court to formulate rules of procedure and evidence for state courts, traditionally, this Court has never failed to advance the standard of due process guarantees and fundamental elements of fairness in state or federal criminal trials. In the *Spencer* case, the majority of this Court has held that, at the very least, the due process clause of the Fourteenth Amendment requires the giving of limiting instructions in order to exclude the prejudicial effect of prior conviction evidence on the ultimate issue of guilt or innocence. Justices Stewart, Brennan and Douglas believe due process requires at least a two stage trial and complete omission of prior crimes on the trial of the primary offense.

Petitioner humbly and respectfully points out that in the instant cause, where the evidence was completely in equipoise, where there was no corroborating factual evidence to sustain the State's position except the word of two security employees of Korvette Department Store, where the petitioner and his wife directly contradicted those witnesses and where the reviewing court in its own opinion states that the entire case rests upon credibility of the witnesses, the absence of even the minimum safeguards defined in *Spencer* v. *Texas,* constituted a deprivation of due process of law and a fair trial.

Wherefore, petitioner prays that this Court grant its writ.

Respectfully submitted,

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APPENDIX A.

Opinion of the Appellate Court of Illinois

Mr. Justice Seidenfeld Delivered The Opinion of The Court:

Defendant appeals from a judgment of conviction, after a jury trial, under a two count indictment of theft of a value of property under $150.00[1] in Count I and the same theft, *"after having been convicted of armed robbery on June 22, 1943"*, [2] in Count II. The jury found the defendant guilty under both charges, but he was given a single sentence of 2 to 4 years in the penitentiary.

The appeal was taken to the Supreme Court which transferred it to this Court, noting,

> "Defendant was convicted of theft under an indictment which charged that he had previously been convicted of armed robbery. He argues that armed robbery is not a type of theft within the meaning of Section 16-1 of the Criminal Code. The argument does not present a constitutional issue.
>
> It is further asserted that he was deprived of a fair trial by reason of the fact that evidence of the former conviction was introduced. No constitutional question is presented. (See *People* v. *Ostrand,* 35 Ill. 2d 520, 529)."

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[1] Ill. Rev. Stat. 1967, Chap. 38, Sec. 16-1.

[2] Ill. Rev. Stat. 1967, Chap. 38, Sec. 16-1, supra:
"Penalty * * * a person convicted of such theft a second or subsequent time, or after a prior conviction of any type of theft, shall be imprisoned in the penitentiary from one to 5 years * * *".

(Appellate Court Opinion)

Defendant contends that robbery is not a "theft" within the meaning of that term in Sec. 16-1 (supra); that he was deprived of a fair trial by reason of the fact that the inclusion of the remote prior conviction was solely for the purpose of prejudicing defendant on the recent charge. (To the extent that these arguments are claimed to assume substantial constitutional proportions, they have been disposed of by the Supreme Court transfer order.) Defendant also contends that he did not receive a fair trial because of an accumulation of trial errors; that the jury was improperly instructed; and that he was not proven guilty beyond a reasonable doubt.

Edward Novy, an assistant security manager for the E. J. Korvette Department Store in Elmhurst, testified that on November 29th, 1966, some time after 1:00 P.M. he saw the defendant in the men's department going into the coat department. Defendant took off his coat, laid it across the coat rack and tried on several coats. The coat that he was first wearing was a black three-quarter length coat. The last one he took from the rack and put on was a car coat length. He then put his own black coat over it. He looked from left to right, at which time he proceeded out of the store without making payment. The witness went out of the store after defendant and approached Ferrara in the parking lot. Novy asked defendant if he had a receipt for the coat and defendant told him that the coat had belonged to him. Novy then told defendant what he had seen take place in the store and testified that defendant responded "Well, all right, I did take it."

Novy further testified that he asked defendant to come back inside the store, and that defendant asked him if there was any way this could be taken care of without going

through all the trouble. When defendant was asked what he meant by this he said he would see that we got $100.00 for it, although he didn't have the money on him at the time, but would get it. The witness refused, at which time defendant said, "Everyone has their price, what's yours". Defendant was advised that he would either have to come back into the store or the police would be called to pick him up in the parking lot. Ferrara accompanied the witness back into the store where the police were called and arrested the defendant.

The witness then identified State's Exhibit No. 1 as the coat taken by defendant and related the procedure by which it was marked and placed in the evidence locker of the store. He had left the employ of Korvette in July of 1967 and had last seen the coat in November of 1966. Novy could not be positive of his own personal knowledge that the coat and ticket were the same items taken from the defendant, as there were no identifying marks placed on the jacket itself.

Kenneth Davis, a security agent for Korvette, testified that he was with Mr. Novy on November 29th, 1966. He saw the defendant come into the men's department, go over to a rack of men's coats, suede coats, remove his own coat, try on several coats and place one on his person. Defendant then placed his own coat over it and left the store without making payment. The witness, with Mr. Novy, followed defendant out of the store and into the parking lot. He testified that Mr. Novy identified himself and asked Ferrara if he had a receipt for the suede jacket that he had on and that Ferrara said no.

(Appellate Court Opinion)

The defendant denied that he had taken the jacket, first saying it was his own jacket and then after being told that both Novy and Davis had observed him the whole time in the store, admitted that he had just gotten in from California, that it was cold and he didn't have much money on him and he needed a jacket, so he stopped in and picked one up. Davis corroborated Novy's testimony as to the offer of the bribe.

Davis identified the suede jacket and a tag which he said defendant removed from the pocket of the jacket and threw on the ground in the parking lot. The witness also testified that there was no identifying marks on the coat and he could not personally know that it was kept in the security locker at all times.

Both witnesses testified that this was the only men's jacket or coat recovered on November 29th, 1966.

There was testimony that the jacket was put into the security locker in a Korvette bag which was marked as State's Exhibit No. 2 for identification, and a written memorandum prepared by Mr. Raymond, the security manager for Korvette, was attached to the sealed bag.

An Elmhurst police officer, Robert Doyle, testified that he was called to the store on the day in question and saw the defendant in the security office of the Korvette company. He testified that a Korvette security officer brought the jacket to the station and that the witness saw it in the station later in the day. The officer said that aside from being rolled and wrinkled it was substantially in the same condition as when he first saw it.

The record of the defendant's 1943 conviction for armed robbery was introduced by the State and the defendant

stipulated that the person named in that indictment was the defendant in this case.

In defendant's case, his wife testified that when they drove to the Korvette store the defendant was wearing the coat identified as State's Exhibit No. 1. When they arrived at the shopping center she went shopping in another store and her husband went to the Korvette store, and she did not see him again until that evening when she was notified that he was being held at the Elmhurst police station. She testified that defendant purchased his coat at the Korvette store in Morton Grove where they were living when they first arrived in the Chicago area from California in September of 1966.

Defendant testified that he had purchased the jacket in October in the Korvette store in Morton Grove and that he did, at no time, take the suede jacket from the Korvette store. He testified that since it was raining he was wearing a raincoat over the jacket and denied that he made any statement to the security officers that he did take a jacket.

The State, on rebuttal, called witnesses who testified that the raincoat, which was marked Defendant's Exhibit 1, was not the coat they saw the defendant wearing on the date in question.

The indictment was proper. The prior conviction of robbery was a conviction of "any type of theft" as encompassed in the penalty provision of the Illinois Theft Statute. (Chap. 38, Sec. 16-1, supra) While robbery is not mentioned by that name in the theft section, but is given a separate category in the code of criminal procedure (Ill. Rev. Stat. 1967, Chap. 38, Sec. 18), robbery in fact has been considered an aggravated form of theft included in the

generic definition of theft in Sec. 16-1. *People* v. *Henderson,* 72 Ill. App. 2d 89, 95 (1966). Theft may also be a lesser included offense in a robbery charge. *People* v. *Tolentino,* 68 Ill. App. 2d 480, 484-5 (1966). The enhanced penalty portion of Sec. 16-1 is not ambiguous in our opinion and authorities to the effect that enhanced penalty provisions are to be strictly construed are not applicable. See *The People* v. *Lund,* 382 Ill. 213, 216 (1943).

The allegation and evidence of the prior offense was necessary to prove the felony charge in Count II of the indictment. It has been settled that evidence of a former conviction can be introduced when it is relevant for the purpose of proving an element of the offense. *The People* v. *Ostrand,* 35 Ill. 2d 520, 529 (1966); *The People* v. *Weaver,* 41 Ill. 2d 434, 438 (1968). A suggestion by defendant that the purpose of alleging and proving the prior offense was merely to prejudice the defendant, is without support in the record. The further argument that the prior offense is too remote in time ignores the clear wording of the statute (Sec. 16-1, supra) which does not limit the time of the prior offense.

Defendant's contention that the conviction under Count I of the indictment must be reversed as a matter of statutory law because the offense in each count arises out of the same conduct has no merit here. The prohibition is against sentencing a defendant for more than one offense resulting from the same conduct, as explored in the case defendant cites, *People* v. *Durant,* 105 Ill. App. 2d 216 (1969). Here defendant was given a single sentence.

We next consider defendant's contention that a combination of trial errors prevented the defendant from re-

ceiving a fair trial. No reference is made to any improper remarks in opening statement or in final argument. The references to questions and answers claimed to have been prejudicial did not have that effect in our opinion from a careful examination of the record, and were, for the most part, the result of a response to inquiries initiated by defendant's counsel.

We will refer to several of the alleged trial errors which defendant has emphasized.

The State's witness, Novy, was allowed to testify over objection that he was bonded in his new job, working for a merchant patrol service. This was elicited on redirect examination after defendant's counsel had inquired whether the witness still worked for Korvette. The State argues that the purpose of this question was to avoid an implication that the witness was unsuited for security work or had left Korvette's employment under a cloud. We are not persuaded by this argument, but we also cannot perceive any substantial prejudice to defendant from the inquiry.

Defendant claims it was error for the State witness, Davis, to testify over objection that State's Exhibit No. 2 was a note and memorandum attached to the outside of a bag, allegedly containing the suede jacket marked State's Exhibit No. 1, and then being allowed to read the note which was to the effect:

> "One Man's Suede Coat, brown in color at $52.99. Evidence held for prosecution of Joseph Ferrara for shoplifting on 29 November, 1966. Apprehended by Ed Novy at 1400 hours, 29 November, 1966. Complaint No. 25480 signed by Novy at Elmhurst Police Station. Before Judge Fitzgerald, 29 November, 1966. Evidence held by Ed Novy for prosecution.

(Appellate Court Opinion)

The record discloses that prior to this, defendant's counsel on cross examination, had been seeking to impeach the witness's identification of the jacket. Defense counsel initiated the inquiry as to whether the bag would help the witness identify the coat and the answer was that the information on the bag would tell the witness what coat was in there. Counsel himself referred to the note by his question, "So, all it says on the bag is that there was a coat, men's suede coat, brown, recovered, isn't that right?". Upon receiving an affirmative answer defendant's counsel then put the question, "but it doesn't tell you that this particular coat was recovered, this one?". In view of this, we believe that the People were properly permitted to refute the inference that there had been any confusion or substitution of the particular jacket alleged to have been stolen.

Objection is made to the court permitting the police officer to testify that he was shown the jacket "that they had said he had taken", by the security officers at a time when the defendant was present. Defendant seems to claim that this created an unfair inference that because defendant was not stated to have said anything at that point his silence showed guilt. However, whether the accusation was heard and whether the circumstances were such that a response would normally be made, are questions for the trial judge to determine, (*The People* v. *Bush*, 29 Ill. 2d 367, 372 (1963)), and we find no abuse of discretion here. When defendant testified, he stated on cross examination that he did protest when he was in the Elmhurst Police Station, so that no prejudice is evident.

While the State improperly asked one of the police officers whether defendant was "interested in making a bond,

as he is entitled to?" at the police station, an objection to the question was promptly sustained by the court and no prejudice to the defendant is evident.

Defendant contends that the trial court erred in giving certain of the State's instructions and in refusing certain instructions offered by him. The conference on instructions has not been fully abstracted, but we have searched the entire record and conclude that no prejudicial error was committed.

Defendant makes particular objection to the State's Instruction No. 9 as being within the prohibition of *The People* v. *Church*, 366 Ill. 149, 160 (1937). It provides:

> "You are not bound to believe something to be fact simply because a witness has stated it to be a fact, if you believe from all evidence that such witness is mistaken, or has testified falsely concerning such alleged fact."

No objection to the giving of the instruction appears in the trial record and defendant cannot be heard to object for the first time on appeal. Moreover, this was not an instruction which told the jury to disregard the entire testimony of the witness whether corroborated or not, which has been been condemned in the cited case. *Devaney* v. *Otis Elevator Co.*, 251 Ill. 28, 38 (1911).

A number of the State's instructions were objected to in conjunction with defendant's argument that the indictment was faulty in permitting the reference to the prior robbery conviction, and we find no error in giving those instructions.

Defendant argues that State's Instruction No. 17 was erroneous in that it attempted to define reasonable doubt,

and in that it required the jury to determine what is essential and material. The instruction provides:

> "The Court instructs the jury that the rule requiring the jury to be satisfied of the guilt of the defendant from the evidence beyond a reasonable doubt in order to warrant a conviction is complied with, if, taking the testimony altogether, the jury is satisfied beyond a reasonable doubt that the defendant is guilty. The reasonable doubt that the jury is permitted to entertain to authorize an acquittal must be as to the guilt of the accused on the whole evidence and not as to any particular fact in the case not essential and material to constitute the offense charged."

The court gave State's Instruction No. 11 defining theft in the language of the statute, and taking the instructions as a whole the elemental facts constituting the crime charged were given to the jury so that State's Instruction No. 17 was not prejudicial. *The People* v. *Weaver,* 18 Ill. 2d 108, 115 (1959).

Defendant's instructions which he claims were erroneously refused were covered by other instructions, and taking the whole series no reversible error has been shown.

The record establishes that defendant's conviction was based upon evidence showing his guilt beyond a reasonable doubt in a trial free from substantial and prejudicial errors. A direct conflict exists between the testimony of the defendant concerning the incident. This conflict was clearly a matter of weight and credibility to be determined by the jury and which the jury resolved in favor of the State.

The judgment is affirmed.

Affirmed.

MORAN, P.J. and DAVIS, J. concur.

APPENDIX B.

(Letterhead Of)
CLERK OF THE SUPREME COURT

November 24, 1969

Messrs. Marco and Mannina
Attorneys at Law
5106 Main Street
Downers Grove, Illinois 60515

Gentlemen:

In Supreme Court today, in case No. 42637 entitled:

People State of Illinois,
respondent

vs.

Joseph Ferrara,
petitioner

Petition for Leave to Appeal was: DENIED

Very truly yours,

/s/ Justin Taft
Clerk of the Supreme Court

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ——

JOSEPH FERRARA,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

RESPONSE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ARGUMENT

THE USE OF A PRIOR CONVICTION TO ENHANCE THE PENALTY PROVIDED FOR THE SUBSTANTIVE OFFENSE AND TO IMPEACH THE PETITIONER DID NOT VIOLATE DUE PROCESS.

A.

WHAT IS NOT INVOLVED IN THIS CASE

The Petition For Certiorari *does not* present the issues of whether the enhanced penalty provision of the Illinois theft statute[1] is constitutional, or whether the Illinois single stage procedure allowing proof of the prior conviction during the trial of the substantive offense violates due process. These questions were decided adversely to Petitioner in *Spencer* v. *Texas*, 385 U.S. 554 (1967) and he does not challenge either the authority or correctness of that opinion here.

Rather, as we understand it, Petitioner contends that:

(1) the use of the prior conviction *to enhance the penalty* violated due process because no "limiting instructions" were given;

(2) the use of the prior conviction *to enhance the penalty* violated due process because the instructions

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[1] Ch. 38, §16-1 Ill. Rev. Stat. (1967) provides that "A person convicted of such theft . . . after a prior conviction of any type of theft" shall be liable to a penalty of one to five years. In this case, the prior conviction was for robbery, which the court below held was included in the description of "any type of theft."

which were given "inferred" that the jury could consider the prior conviction as evidence of the substantive offense;

(3) the use of the prior conviction *to impeach* the defendant violated due process because it was too "remote."[2]

B.

THE ENHANCED PENALTY ARGUMENT

First, it is true that the jury which convicted Petitioner was not instructed specifically that evidence of the prior conviction could not be taken as evidence of the substantive offense, but it was equally true that Petitioner, at trial, offered no such limiting instruction. Under Illinois law it was his duty to do so and, by his failure in this regard, the point was waived.[3]

Second, the argument that due process was violated for failure to give a "limiting" instruction was not raised or passed upon in the Appellate Court of Illinois. That being so, the question cannot be presented to this Court.[4]

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[2] The conviction which both enhanced the penalty and impeached credibility occurred in 1943, 25 years prior to trial in this case. The State did not use a 1938 conviction, also for robbery (Add. Abst. 41), neither did it use a 1965 California conviction for theft, presumably because of the difficulties attending proof of out of state convictions. See Defendant's Brief in the Supreme Court of Illinois, pp. 20-21; States Brief, pp. 13-14.

[3] *See, e.g., People* v. *Lawson,* 328 Ill. 602, 606 (1928).

[4] *Abel* v. *United States,* 362 U.S. 217, 230 (1960).

Third, the argument that the given instructions, presumably State's Instructions No. 12 and 17,[5] "inferred" that evidence of the prior offense was evidence of the offense for which he stood trial, is specious. The jury was simply told in Instruction No. 12 that Petitioner could not be convicted of Count II, the enhanced penalty count, unless he had committed the crime of theft (the elements of which were enumerated) after having been previously convicted of theft. And Instruction No. 17 told the jury that reasonable doubt would justify an acquittal only if the doubt went to a fact "essential and material to constitute the offense charged." Under Illinois law, proof of the prior offense *is* "essential and material" to conviction for second offense theft.[6] It is simply erroneous, therefore, to say, as Petitioner does, that Instruction No. 17 improperly emphasizes only part of the evidence. Read in conjunction with Instruction No. 11 (simple theft) and Instruction No. 12 (second offense theft), it is inconceivable that any jury could believe that if "petitioner's prior conviction was proved but that they did not believe the primary charge was proved, they still were not authorized to acquit." (Pet. 11).[7]

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[5] *See* Pet. 10.

[6] *Cf. People* v. *Ostrand*, 35 Ill. 2d 516 (1966) and *People* v. *Owens*, 37 Ill. 2d 131 (1967).

[7] This argument is further belied by the fact that the jury did convict on Count I, simple theft.

C.

THE IMPEACHMENT ARGUMENT

Petitioner contends that the use of a 25 year old conviction to impeach was so "remote" that due process of law was violated.

We cannot find in the record, however, that this claim was squarely presented to the Appellate Court. There the argument was made that the use of a 25 year old conviction to *enhance the penalty* was too remote.[8] This argument was rejected by the Appellate Court of Illinois as one involving a legislative determination,[9] and is not pursued in the Petition For Certiorari.

Finally, we do not believe that the question of how "remote" a conviction is presents a substantial federal constitutional question in a case where the record is unclear that the point was properly raised below; the state court did not pass on the issue and neither the propriety of impeachment by prior conviction nor the use of a robbery conviction as bearing upon the trait of credibility are attacked. "The far-reaching and important questions [sought to] be tendered by this claim are not presented

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[8] The brief suggestion on pp. 25-27 of Defendant's Brief comes the nearest to presenting the point (remoteness as to impeachment) but the Appellate Court, in its opinion, did not pass on it and it does not appear to have been raised in the trial court. In this respect, the Petition does not comply with Rule 23 (1) (f) of this Court.

[9] *Compare* Ch. 38, §16-1 (theft; no limitation on time of prior offense) *with* Ch. 38, §24-1 (weapons; five year limitation).

by the record with sufficient clarity to require or justify their decision," *Mishkin* v. *New York*, 383 U.S. 502, 512-13 (1966). For this reason, we believe that a grant of the Writ of Certiorari in this case would not be provident.

CONCLUSION

The People of the State of Illinois request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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